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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

HENRY J.N. TAUB,
Petitioner,

v.

CITY OF DEER PARK, TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, City of Deer Park, Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment in this case by the Supreme Court of Texas. The opinion of the Supreme Court of Texas is reported at 882 S.W. 2d 824 and is reprinted in the appendices to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner's statement of the case is misleading, incomplete, and inaccurate. The following accurately reflects the facts material to the Questions Presented in the petition. Unless otherwise indicated, references are to the record in the district (trial) court. "Tr." refers to the Transcript of the record; "S.F." refers to the Statement of Facts; "Px.," "Dx.," and "Jt. Ex." refer to plaintiff's exhibits, defendant's

exhibits, and joint exhibits, respectively. References to "Pet." are to the Petition for Writ of Certiorari.

For clarity, Petitioner will be referred to as "Taub" and Respondent will be referred to as "Deer Park" or "City."

The issue presented in this case is whether a Deer Park zoning regulation restricting the use of Taub's property to single-family residential purposes constitutes an "economic taking."

Taub was the owner of a 69.6684 acre tract of land (hereinafter referred to as the "Tract") located within the corporate limits of Deer Park. (S.F. Vol. 2, p. 106). His family acquired the Tract in the 1930s. (S. F. Vol. 2, p. 117). Taub acquired his interest in the Tract through inheritance. (S.F. Vol. 2, p. 106).

In 1978, Deer Park filed two eminent domain proceedings to acquire certain portions of the Tract. The City sought 2.4691 acres for street improvements and another 14.5616 acres to construct a drainage ditch. Special Commissioners were duly appointed, hearings were conducted, and awards were made for the value of the property taken and the damage to the remainder. Taub duly filed objections to such awards and perfected an appeal. (S.F. Vol. 3B, Jt. Ex. C).

Deer Park originally enacted a comprehensive plan and zoning ordinance in 1963. In 1971, the City's comprehensive plan was updated and the current zoning ordinance was enacted. The Tract is zoned single-family residential under the provisions of such ordinance. (S.F. Vol. 3B, Jt. Ex. A). The zoning classification of the Tract remained single-family residential without dispute until 1980 when, prior to the trial of his appeal of the condemnation

awards, Taub filed an application with the Planning and Zoning Commission of Deer Park seeking to rezone the Tract, including portions of the land sought to be condemned by Deer Park, from single-family residential to multi-family residential. (S.F. Vol. 4, Px. 7).

The Planning and Zoning Commission and City Council timely conducted public hearings on Taub's rezoning application. In such hearings, Deer Park residents, as well as City and school officials, strenuously objected to Taub's rezoning request. There was substantial testimony that rezoning the Tract for multi-family residential use would seriously impede Deer Park's ability to provide adequate and necessary City services. Directors of various City departments agreed that multi-family housing on the Tract would upset a well-planned comprehensive program for fire and police protection, traffic control, water and sanitary sewer services, and recreational facilities. The superintendent of the Deer Park Independent School District testified that the proposed rezoning would detrimentally alter long-range planning for schools, building programs, bond issues, and student education. Both the Planning and Zoning Commission and the City Council voted unanimously to deny Taub's request. (S.F. Vol. 3B, Jt. Ex. B).

Taub then filed in district court his Original Petition and Application for Temporary Restraining Order and Temporary Injunction alleging that Deer Park's refusal to rezone his property from single-family residential to multi-family residential was arbitrary, unreasonable, and confiscatory because the restriction denied him the beneficial use of his property, thus depriving him of such property without due process of law and without just compensation. (Tr. 6, 11). In such proceeding, Taub sought to enjoin the filing of the awards in the condemnation proceedings, thereby delaying the date of the taking until such time that

the validity of the City's denial of his rezoning request could be determined. Taub asserted that if the denial of his rezoning request were adjudged improper, he would be entitled to valuation of a portion of the condemned tracts, and any damage to the remainder, on the basis of their value for multi-family residential purposes, which he alleged would result in the Tract having a much higher value. (Tr. 10). The condemnation proceedings filed by the City were transferred to the district court and consolidated with Taub's action. (Tr. 71). The trial court found that rezoning the Tract from single-family residential to multi-family residential would seriously impede the City's ability to provide necessary services for the health, safety, and welfare of its citizens, that Deer Park's zoning regulations were not unreasonable or arbitrary, that the City's refusal to rezone the Tract was not unreasonable or arbitrary, or confiscatory, and that the value of the property condemned by Deer Park was $7,000 per acre. (Tr. 166-169).

Taub does not challenge the legitimacy of the governmental action in this case, nor does he contend that the zoning regulation does not substantially advance legitimate state interests. In fact, he admits that the City's zoning regulation was adopted to accomplish a legitimate goal and that it is substantially related to public health, safety, and general welfare. (Petitioner's Application for Writ of Error to the Supreme Court of Texas, p. 23). The gravamen of Taub's challenge is based on the argument that inclusion of the Tract within the City's single-family residential zoning district is confiscatory and invalid because it denies him any viable economic use of such property and therefore amounts to an "economic taking."

In his Petition for Writ of Certiorari Taub represents, as established fact, that the governmental action denied him any viable economic use of the Tract. Neither the record in

this case nor the findings of the courts below support this representation.

The only evidence offered by Taub that the City's actions deprived him of any viable economic use of the Tract consisted of an engineering study (S.F. Vol. 4, Px. 1) which assumed Taub's property would be developed into a subdivision with a specified lot size, lot price, home size, and home price range. The study concluded, based on such assumption, that a single-family residential development on the Tract would not be profitable. The study did not consider alternative schemes for single-family residential development, nor did it consider future prospects of profitable development for such purposes. In other words, the study was limited to a single development scenario from a snapshot in time.

Additional evidence contradicts Taub's assertion that the City's zoning restriction denied him any viable economic use of the Tract. That evidence relates to the market value of the Tract. It is uncontroverted that the Tract has substantial market value. Taub testified that, in his opinion, the Tract's value for single-family residential purposes was about $15,000 per acre. (S.F. Vol. 2, p. 112). Taub's own expert appraiser testified that the Tract had a fair market value of $7,000 per acre. (S.F. Vol. 2, p. 84; S.F. Vol 4, Px. 4). This valuation took into consideration the highest and best use of the Tract as restricted by its single-family residential zoning. (S.F. Vol. 4, Px. 4, p. I-2). The appraiser could not have determined such value without concluding that the Tract could be profitably developed or that its profitable development was anticipated.

Taub testified that he, and his family before him, held the Tract simply as an investment. (S.F. Vol. 2, p. 130, 132). There is no evidence that he was in the real estate

development business or that he had any intent or desire to develop the Tract. It appears that he was interested in rezoning the Tract to a multi-family residential classification because of the potential increase in its market value, an increase which would affect both the award in the condemnation proceedings and the proceeds from any future sale of the property.

The uncontroverted evidence in this case clearly establishes, and the courts below found, that: (1) the City's land use regulation advances a legitimate state interest which has a substantial relationship to public health, safety, morals, and general welfare; and (2) the impact of the regulation did not render Taub's land useless or deprive him of all economically beneficial use thereof. After weighing the public and private interests involved, the Supreme Court of Texas correctly concluded that Taub had failed to show a sufficiently severe economic impact to establish an "economic taking." (Pet. A-4).

REASONS WHY THE PETITION SHOULD BE DENIED

The Supreme Court of Texas followed the standards promulgated by this Court in determining whether Deer Park's single-family residential zoning classification of the Tract constitutes an "economic taking."

No "set formula" has been established to determine whether or not a particular governmental regulation results in an economic taking. Instead, this Court has preferred to engage in essentially ad hoc, factual inquiries. Several factors have particular significance in the determination of an economic taking case: (1) the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations; and (2) the character of the

governmental action. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The first inquiry should examine the extent of economic impact on the claimant resulting from the regulation and the legitimacy of the state interest. Generally, if a zoning ordinance denies an owner all economically viable use of his property, or does not substantially advance legitimate state interests, it effects a taking. *Lucas v. South Carolina Coastal Council*, ___U.S.___, 112 S.Ct. 2886, 2894 (1992); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The leading cases which have held that takings occurred as a result of economic impact have been based on findings that the properties in issue were rendered wholly useless or their values totally destroyed, thus denying all economically beneficial or productive use of such properties. *Lucas; First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, Cal.*, 482 U.S. 304 (1987); *Armstrong v. United States*, 364 U.S. 40 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Property is rendered wholly useless when the governmental regulation prohibits any use of the property or the regulation is so burdensome that it has the effect of rendering the property valueless. In *Lucas* and *First English*, the governmental regulation actually prohibited any meaningful use of the property. In *Armstrong*, the total value of the property was destroyed. In *Pennsylvania Coal*, the governmental regulation made use of the properties impractical to the extent they were rendered useless for the investment backed expectations of the owners.

Decisions sustaining land use regulations which are reasonably related to the preservation and promotion of general welfare uniformly reject the proposition that

diminution in property value, standing alone, can establish a taking. *Penn Central*, 438 U.S. at 131. See also *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution in value). Absent a finding that the governmental regulation does not substantially advance legitimate state interests or that it denies an owner all economically viable use of his property, the question of whether the governmental action constitutes a taking requires a weighing of public and private interests. In those situations where a zoning regulation substantially advances legitimate governmental goals, the benefits to the public must be considered along with any diminution in market value that the property owner might suffer. *Agins*, 447 U.S. at 261-262. The determination of whether a taking occurs requires an ad hoc, factual inquiry into the character and legitimacy of the governmental action weighed against the extent of diminution in value. *Agins*; *Penn Central; Pennsylania Coal.* Such a balancing is required in this case.

These standards for review in an economic taking case are precisely the standards followed by the Supreme Court of Texas in rendering its decision in this case. The court recognized that "[A]n act short of actual physical invasion, appropriation, or occupancy can amount to a compensable taking when a government agency has imposed restrictions that constitute an unreasonable interference with the landowner's right to use and enjoy the property.". (Pet. A-3). The court's first inquiry examined the extent of economic impact Deer Park's zoning regulation had on Taub's Tract. It recognized the importance of the consideration of whether Taub's property had been rendered wholly useless or whether its value had been totally destroyed, noting that total destruction by the government of all value is a taking. (Pet. A-3). However, the court found that "Taub's land is not rendered completely useless or

deprived of all economically beneficial use."[1] (Pet. A-4). The court then properly weighed the character of the governmental action and its uncontested legitimacy against the economic impact of such action on Taub's Tract. It's conclusion was that Taub failed to show, under the circumstances of this case, a sufficiently severe economic impact to constitute a taking (Pet. A-4).

In this case, Taub failed to show any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

The hypothesis of Taub's argument that the holdings of the Supreme Court of Texas conflict with applicable standards established by this Court, and that such holdings were in error, is predicated on the assumption that Deer Park's zoning ordinance denies him all economically beneficial use of his property. Taub's assumption is contrary to the evidence presented in this case and to the findings of the courts below.

The only evidence presented by Taub regarding the economic impact of the City's zoning restriction was an engineering study. The study was limited in scope, and its opinion regarding profitability was drawn from a narrowly defined scheme of single-family residential development which considered only economic conditions existing at the point in time of such study. The study failed to consider both future prospects for profitable development of the Tract

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[1] Taub's statement in footnote 9 on page 12 of his Petition that the "Texas Supreme Court *did* hold that Petitioner proved that the land could not be profitably developed for single-family residential use" is incorrect. The court made no such holding.

for single-family residential purposes or alternative single-family development schemes.

The determination of economic impact must include time as a factor; it cannot be validly judged from a snapshot in time. If such were the case, the impact of each and every zoning action would be measured by temporary economic conditions only, without regard to factors realistically affecting profitability which are totally unrelated to the zoning regulation. With or without zoning, temporary market conditions frequently make property unsuitable for immediate development. Surely there are thousands of zoned tracts of land in this country which are not subject to profitable development at this moment; however, each may have substantial value based upon reasonably anticipated changes in economic conditions or other market factors. Such anticipated changes might include simple upward turns in the local or national economies or something more definite, such as the extension of roadway or drainage systems, or water or sewer facilities, the development of adjacent or neighboring properties, or demand resulting from the influx of population. Under such circumstances the properties maintain substantial value because of the reasonable anticipation of their future profitable development.

In addition, Taub offered no evidence of profitability using alternative development schemes.[2] The demand for housing is not fixed to a particular lot size or price range. The market for housing may include a wide range of

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[2] Taub's statement in footnote 6 on page 6 of his Petition that "[A]ll other possibilities were considered and rejected as being even less productive" is inaccurate. There was no evidence presented at trial to that effect nor was there any evidence presented which would support the conclusion that no alternative single-family residential development scenario would be profitable.

development schemes, with innumerable alternatives. No evidence of the profitability of any other market than that contained in the limited engineering study was offered.

When undeveloped property is involved, a precise indicator of the economic impact of a land use restriction is its effect on the property's fair market value. In this case, there was no value established before the imposition of the zoning restriction. There is, however, proof as to the Tract's value at the time of the alleged taking. That proof is the uncontroverted evidence that Taub's Tract has a substantial value. Taub's own expert appraiser testified that the Tract had a fair market value of $7,000 per acre. His valuation of the Tract took into consideration that its use was restricted by Deer Park's zoning ordinance to single-family residential purposes. In arriving at such value, the appraiser had to conclude that it could either be profitably developed or that its profitable development was reasonably anticipated. Clearly, this evidence establishes that Taub's Tract has a substantial economically beneficial use.

Taub's proof regarding the profitability of development of the Tract for single-family residential purposes was inadequate to establish that such zoning denied him all economically beneficial use of his property. Such was the holding in the courts below.

There was no finding of fact by the trial court that the Tract could not be profitably developed as single-family residential, nor was there a finding that the City's zoning classification, or refusal to rezone, denied Taub all economically beneficial use of the Tract. (Tr. 161). To the contrary, the trial court found that Taub's Tract was suitable for use as single-family residential, that the City's zoning ordinance was not unreasonable or arbitrary, and that the refusal to rezone the Tract to multi-family residential was not

confiscatory. (Tr. 168-169; Pet. D-4). The Texas Court of Appeals concluded that Taub's evidence was insufficient to prove, as a matter of law, that *any* single-family residential development would not be economically feasible (Pet. B-4), and the Supreme Court of Texas concluded that Taub had not been deprived of all economically beneficial use of his property. (Pet. A-4).

The evidence is clear and uncontroverted that Taub held the Tract for investment purposes, and that under a single-family zoning classification it had a substantial value of at least $7,000 per acre. Considering Taub's investment-backed expectations, and the character and legitimacy of the governmental action involved, the economic impact of the City's single-family residential zoning classification clearly does not reach the threshold necessary to establish an economic taking.

Neither the decision below nor the record of this case raise the Questions Presented in the petition. The standards for review of an economic taking case established by this Court are the standards precisely followed by the Supreme Court of Texas in this case. The record clearly establishes that the City's zoning regulation was adopted to accomplish a legitimate goal and that it is substantially related to public health, safety, and general welfare. It is equally clear that Deer Park's zoning regulation has not denied Taub the economically beneficial use of his property. To the contrary, the undisputed evidence establishes that Taub's Tract has substantial value and, considering his expected use of it as an investment, a substantial economically beneficial use. The Supreme Court of Texas weighed the character of the governmental action, and the economic impact of such action on the property affected, and correctly concluded under the circumstances of this case that Taub had failed to establish a sufficiently severe economic impact to establish a taking.

The application of standards clearly established by this Court to the record in this case results in the unmistakable conclusion that Deer Park's zoning regulations do not effect an " economic taking" of Taub's Tract. The opinion of the Supreme Court of Texas is clearly in harmony with the jurisprudence of this Court. This case presents no issue of law undecided by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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